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No. 80-177

IN THE

Supreme Court of the United States

October Term, 1980

DANA CORPORATION AND THE ECHLIN MANUFACTURING CO.,

Appellants,

vs.

STATE OF CALIFORNIA AND LEGISLATURE OF THE STATE OF CALIFORNIA, COMBUSTION SCIENCES, INC., *et al.*,

Appellees.

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Memorandum of Appellee in Support of Jurisdictional Statement.

GRAYSON, GROSS, FRIEDMAN, PHILLIPS, RASCH, & BLOCK,
SAUL GRAYSON,
RICHARD D. FARKAS,
10880 Wilshire Blvd., Suite 2121,
Los Angeles, Calif. 90024,
(213) 879-9200,
Attorneys for Appellee, Combustion Sciences, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Memorandum of Appellee in Support of Jurisdictional Statement.

Questions Presented.

1) Whether as a matter of law the Appellees could abrogate without consequence their contracts with the Appellants by enacting legislation allegedly under the police power?

2) Whether the Appellants' contracts with the Appellees were invalid *ab initio* as an impermissible restraint on the police power of the State of California?

3) Whether the Appellants' complaints state a cause of action against the Appellees for taking of property for which the Fifth Amendment requires compensation.

4) Whether the determination by the California Court of Appeal that the California Tort Claims Act immunizes Appellees from suit by Appellants herein for violation of Appellants' constitutional rights runs contrary to the Supremacy Clause of the United States Constitution.

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Appellees,[1] Combustion Sciences, Inc., respectfully pray that this Court grant the Appellants' Appeal to review the judgment and opinion of the Court of Appeal of the State of California,[2] which affirmed the Superior Court's dismissal of the Appellants' complaints without leave to amend.[3] Appellee Combustion Sciences, Inc., adopted the pleadings of Appellant throughout all California proceedings. Appellants sought review of this judgment and opinion in the Supreme Court of the State of California. Hearing was denied.

OPINIONS BELOW.

The unreported Minute Order of the Superior Court of California, County of Los Angeles entered December 6, 1977 appears in the appendix at 1.

The reported opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, filed March 13, 1980 appears in the appendix at 2.

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[1]Appellants and Appellees Combustion Sciences, Inc., were plaintiffs and appellants below. Appellants are: Dana Corporation (hereinafter "Dana") and The Echlin Manufacturing Company (hereinafter "Echlin"). The Appellees include the defendants and appellees below. They are the State of California and the Legislature of the State of California. The Appellees include Contignitron Company and Combustion Sciences, Inc., who were plaintiffs and appellants below. However, where the word Appellees is used in this memorandum, it refers only to the State of California and the Legislature of the State of California. Where the word Appellants is used hereafter, it refers to Combustion Sciences, Inc. (hereinafter "CSI"), as well as to Dana and Echlin. Concurrently, Dana and Echlin have sought review of the judgment below. By separate appeal, Contignitron Company sought review of the same judgment. With their gracious permission, CSI's Memorandum parallels the Jurisdictional Statement it supports.

[2]California Court of Appeal, Second Appellate District, Division Four (per Kingsley, Acting P.J.) (hereinafter "Court of Appeal").

[3]Superior Court of Los Angeles County (Hon. Jack T. Ryburn, Judge).

The California Supreme Court denied the Appellants' Petition for Hearing on May 8, 1980 without opinion. The notice of that denial appears in the appendix at 6.

JURISDICTION.

The Appellees invoke this Court's jurisdiction under 28 U.S.C. Sec. 1257(2). The judgment and opinion of the Court of Appeal affirming the dismissal of Appellants' complaints with prejudice was entered on March 13, 1980. On May 8, 1980, the California Supreme Court denied the Appellants' petition for hearing. The Appellants' jurisdictional statement was properly filed within 90 days of that denial. This memorandum is filed within 20 days of that jurisdiction statement.

CONSTITUTIONAL PROVISIONS INVOLVED.

Article 1, Sec. 10 of the United States Constitution provides in pertinent part that "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article 6, cl. 2 of the United States Constitution provides in pertinent part that "This Constitution, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED.

The Air Resources Act, Ch. 1507, 1971 Cal.Legis.Serv. 3205-06 (amending the Air Resources Act of 1967, Cal. Health and Safety Code §39177.1 and Cal. Vehicles Code §4602 (West)) and the repealing amendments pertinent to

this action are set out in full in the appendix at 7, 12 and 15.

The relevant sections of the California Tort Claims Act of 1963 (Cal. Government Code §§814, 818.2, and 821 (West)) are set out in full in the appendix at 19.

STATEMENT OF THE CASE.

The Appellants' Appeal results from the affirmance by the Court of Appeal of an order sustaining demurrers to Appellants' complaints without leave to amend. Therefore, the courts of California accepted as true the facts alleged in Appellants' complaints unless "contrary to law or to a fact of which a court may take judicial notice." *Agins v. City of Tiburon*, ... U.S. ...., 100 S.Ct. 2138, 2141 n.6 (1980) citing *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 105, 127 Cal.Rptr. 520, 522 (1976). No other facts are before the court for its consideration.

The Complaints[4] stated:

In the late 1960's, there occurred an air pollution crisis in California. Greatly contributing to this crisis was the emission of oxides of nitrogen (hereinafter "NOx") from motor vehicles manufactured in the particular model years

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[4]Separate complaints were filed in the California Superior Court by Dana, Echlin, Contignitron and Combustion Sciences. The allegations of Combustion Sciences' complaint are different from the complaints of Dana and Echlin which were also dismissed, the differences being principally in the more detailed allegations in the Dana and Echlin complaints of direct personal inducements by Appellees to Dana and Echlin. The same direct personal inducements were also made to Combustion Sciences, Inc. Moreover, as indicated herein, Combustion Sciences' damages, in part, resulted from the loss of royalties payable to Combustion Sciences by Echlin; said royalty losses were caused directly by the acts alleged in the Dana and Echlin complaints. If Appellants should prevail on appeal, Combustion Sciences, Inc. could amend its complaint to allege the same facts as Dana and Echlin. The Statement of the Case in this Memorandum, therefore, is virtually identical to the one contained in the Dana and Echlin Jurisdictional Statement.

1966-1970. From 1968 until 1971, demand grew from various sources, including the Appellees, for action to reduce NOx emissions from 1966-1970 vehicles. However, devices to control such NOx emissions were not commercially available.

Reacting to the crisis, the Appellees, through the State of California Air Resources Board (hereinafter "ARB"), consulted with potential manufacturers, including the Appellants, to determine whether they would develop and make available devices to reduce NOx emissions for 1966-1970 automobiles. The Legislature was informed by the ARB that the manufacturers would undertake such a project *if and only if the law were changed to require the installation of such devices on all 1966 to 1970 automobiles in California.*

As a result, in November, 1971, the Appellees enacted legislation (hereinafter the "NOx legislation") which required most 1966-1970 motor vehicles (hereinafter "Subject Vehicles") to be equipped with an ARB accredited NOx device not later than February 1973. This legislation constituted an offer to Appellants that if they would undertake to design, obtain accreditation for and manufacture sufficient numbers of NOx devices, then the Appellees would require the mandatory installation of such devices on the Subject Vehicles. In order to assure rapid installation of NOx devices, the Appellees enacted the NOx legislation as an urgency statute, stating:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:
>
> Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the

health and safety of the majority of California citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this act will also give manufacturers additional time to develop such devices." Ch. 1507, §8 (1971).

The NOx legislation vested the ARB with the authority to accredit and certify for installation on Subject Vehicles NOx devices and, while it set no absolute standard for reduction of NOx to be achieved by an accreditable device, it authorized the ARB to set such standards and to establish a mandatory installation schedule. In other words, the ARB became a compliance officer, charged with responsibility for determining whether and when manufacturers had complied with the terms of the Legislature's offer.

Despite the urgency of the NOx legislation, by March 31, 1972, no company had yet submitted a device for accreditation. The ARB then wrote a letter to the manufacturers, including Appellants, which stated in part:

"Gentlemen:

The Air Resources Board, at its meeting on April 19, 1972, at Sacramento, will take up the status of NOx control devices for 1966-70 light-duty vehicles.

This subject has been discussed by the Board and the staff with members of the industry for some time. The Board and staff were led to believe that devices would be available if the State chose to require their installation.

The legislature was likewise informed, and as a result passed SB 578, which requires installation of NOx devices on 1966-70 light-duty vehicles by January 1973. The bill was signed by the Governor on Novem-

> ber 16, 1971 and on November 17 the Board adopted a test procedure for accreditation.
>
> We understand several companies have undertaken testing, but no application has yet been filed with the Board. The Board wishes to find out why there are no applications and what alternatives exist to comply with the law and will call upon your representative at the April 19th meeting to give a brief statement for your company on the subject."

Appellants accepted Appellees' offer by designing, obtaining accreditation for and manufacturing the NOx devices. Appellants invested millions of dollars in the design and manufacture of smog devices at the express request of the State. The NOx devices submitted by the Appellants were accredited in August 1972. Combustion Sciences, Inc., in reliance on the actions of Appellees, was induced to and did engage in extensive research, development and engineering toward production of NOx devices, expending in the process, considerable time, money and effort. Combustion Sciences licensed the basic exhaust emission control device it developed to Echlin.

The ARB decided that the Appellants would not be able to produce enough devices, or to establish distribution systems and train device installers in time to meet the February, 1973, installation deadline provided for in the NOx legislation. Acting under a provision of the NOx legislation which allowed delay "for extraordinary and compelling reasons," the ARB suspended the requirement that all vehicles have the devices installed by early 1973 and began working on a new schedule. The Appellants were told by the ARB that an installation schedule would be adopted if Appellants provided more information regarding production, distribution, and installation training and if Appellants committed themselves to produce the NOx devices within the time

specified in the installation schedule. Appellants provided the information and agreed to produce sufficient devices for all subject 1966-70 vehicles in California. Whereupon the ARB adopted a schedule providing for mandatory installation of NOx devices on all Subject Vehicles by May, 1974.

On December 19, 1973, at the request of the Governor of California, the ARB adopted a resolution delaying the installation deadline. However, in compliance with a writ of mandamus from the California Supreme Court, the ARB vacated the resolution to delay mandatory installation and adopted an installation deadline of June 30, 1975.

By January 1, 1974, Dana and Echlin had invested approximately $10 million and $5 million, respectively, in the implementation of the NOx program at the inducement of the legislation and the express request of the ARB acting pursuant to the legislation. The cost to the Appellants included, among other things, the research and development of the devices and of the installation program, the manufacture of a large inventory of NOx devices on an expedited basis to meet the requirements of the installation schedules established by the ARB, training seminars for 11,700 Class-A mechanics, and the establishment of field offices throughout California to secure the smooth operation of the installation program.

On September 5, 1974 and again on April 23, 1975, the Appellees amended the Air Resources Act, (A at 29 and 48) (hereinafter "repeal legislation"). The amendments repealed the provisions which required the mandatory installation of the NOx devices on all subject vehicles and reduced to an insignificant number the motor vehicles upon which the NOx device was required to be installed. By enacting the repeal legislation the State rescinded its promise to these appellants to require the installation of NOx devices on all

subject vehicles and rendered the Appellants' large inventory of NOx devices valueless.

As a result of the actions of Appellees, the uses for which the Echlin devices could be utilized were eliminated, denying Echlin the sale of the devices. Consequently, Combustion Sciences, Inc. was denied the royalties due it from Echlin under their licensing agreement. Thus, substantial property rights of Combustion Sciences were taken without compensation, damaging CSI an amount in excess of $2 million.

HOW FEDERAL QUESTION IS PRESENTED.

The Appellants initiated this suit in the Superior Court of Los Angeles County for breach of contract, for taking of property without just compensation, and on other grounds not discussed in the Appeal.

The complaint of Appellants challenged the validity of the repeal legislation as an impairment of the contractual duties which the State had imposed upon itself in entering into contracts with Appellants and a taking of property without compensation.

The Appellees demurred to the complaints filed by Appellants on identical grounds. Appellees argued that the State of California was totally free to abrogate any contract with Appellants, without consequence, if the abrogation occurred in the form of legislation which the State contended was passed in the exercise of its police power; that any contract which limited the police power of the State was "void *ab initio*"; and that the repeal of those portions of the NOx legislation making device installation mandatory was not a taking for which any compensation was required..

The Superior Court dismissed all causes of action alleged by the Appellants without leave to amend.

The Appellants appealed to the California Court of Appeal asserting that they alleged facts sufficient to state a claim under all theories. The Appellants argued that the alleged contracts could not, as a matter of law, be abrogated without consequence in the alleged exercise of the State's police power and were not void *ab initio*. Appellants also pointed out, as they had in the Superior Court, that even the exercise of the State's police power may be constrained by the Contract Clause of the United States Constitution. Appellants also argued that the facts alleged were sufficient to constitute a cause of action for the taking of Appellants' property without compensation.

The Court of Appeal affirmed the Superior Court's order dismissing the Appellants' complaints with prejudice on two separate grounds. First, the Court of Appeal held that the Appellees were immune from any suit seeking a remedy for impairment of contract resulting from legislation assertedly passed in the exercise of the State's police power. The Court of Appeal also held that the California Tort Claims Act of 1963 immunized the Appellees from suit under any of the alleged theories.

Appellants herein petitioned for a hearing before the California Supreme Court, again raising the issues that are now before this Court. The Appellants argued that the Court of Appeal misconstrued the nature of the case, ignored the Contract Clause and the Fifth Amendment of the United States Constitution, and unconstitutionally expanded the California Tort Claims Act to deny Appellants a remedy for the violation of Appellants' constitutional rights by Appellees. The Supreme Court of California denied Appellants' Petition for Hearing on May 8, 1980.

REASONS FOR GRANTING THE WRIT.

The Court of Appeal for the State of California disposed of this case with two broad theories, both of which presume to provide Appellees with absolute immunity, as a matter of law from the constitutional claims asserted by the Appellants. The Court of Appeal held that "the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose." (A-5). Second, the Court of Appeal found that regardless of the claims alleged by the Appellants, the California Tort Claims Act of 1963 provides the Appellees with "an express governmental immunity." As will be discussed below, both alleged statements of law are incorrect because they ignore the Contract Clause and the Fifth Amendment of the United States Constitution and directly conflict with this Court's interpretation of these provisions.

A. The Court of Appeal's Holding That the Alleged Contracts Could, as a Matter of Law, Be Abrogated Without Consequence in the Exercise of the Appellees Police Power Ignores Decisions of This Court Applying the Contract Clause of the United States Constitution.

The Court of Appeal's opinion incorrectly concludes that even if valid contracts existed between the Appellants and Appellees, the Appellees can not be held liable for any remedy for impairing such contracts if that abrogation was a result of the exercise of the police power of the State. This Court has made it clear that "the power of a state to modify or affect the obligation of contract is not without limit." *El Paso v. Simmons*, 379 U.S. 497, 509, 13 L.Ed.2d 446, *reh. denied* 380 U.S. 926, 13 L.Ed.2d 813 (1965). This is so even in the exercise of the state's police powers. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 52

L.Ed.2d 92 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 57 L.Ed.2d 727, *reh. denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978).

In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92 (1977), this Court addressed the relationship between a state's police powers and its contractual obligations. The States of New York and New Jersey had passed legislation which restricted the uses which the Port Authority (a separate governmental entity) could make of its assets. That legislation was passed for the purpose of inducing investors to purchase Port Authority Bonds by making the investment appear more secure. The legislation, in effect, promised prospective bondholders of the Port Authority that as long as any of the bonds remained outstanding, the Port Authority could not use pledged revenues or reserves for other than permitted purposes. In 1974 New York and New Jersey determined that the Port Authority could not operate efficiently under this restriction. Therefore, in the exercise of their police power both States repealed the legislation. Bondholders sued to challenge this repeal as an unconstitutional impairment of contract.

> "*After a trial*, the Superior Court ruled that the statutory repeal was a reasonable exercise of New Jersey's police power," and therefore did not violate the impairment of contracts clauses of either the United States or New Jersey constitutions. 431 U.S. at 3. (Emphasis added.)

This Court reversed. In so doing, this Court ruled that the assertion that the repeal of the legislation was an exercise of the police power of the State was not sufficient to insulate that action from the effects of the Contract Clause of the Constitution:

> The trial court concluded that repeal of the 1962 covenant was a valid exercise of New Jersey's police power

> because repeal served important public interests in mass transportation, energy conservation, and environmental protection. (Citation omitted.) *Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation.* 431 U.S. at 21. (Emphasis added.)

This Court stated that an impairment of a contract is constitutional only if it is "reasonable and necessary to serve an important public purpose." 431 U.S. at 25. In applying this standard to contracts to which the State is a party, this Court emphasized that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 26.

In *Allied Structural Steel Co. v. Spannous*, 438 U.S. 234, 57 L.Ed.2d 727, *reh denied* 439 U.S. 886, 58 L.Ed.2d 201 (1978), this Court reiterated that the Contract Clause limits the power of the state to abridge existing contracts, even when the state relies upon its police power:

> "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's." 438 U.S. at 242.

Allied Structural Steel involved a state's unconstitutional impairment of a private contract through the exercise of its police powers. In order to evaluate the state's interference with a private contract, this Court made a detailed factual

inquiry of *the trial court record* to determine the circumstances under which the state had been passed, the scope and purpose of the statute and its effect upon those whose conduct is sought to prescribe. 438 U.S. at 244-51. No such inquiry was required or allowed in this case, despite the fact that this Court in both the *United States Trust Co., supra* at 22-23 and 25-26, and in *Allied Structural Steel Co. v. Spannaus, supra* at 244, noted that "*impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.*" 438 U.S. at 244.

The Seventh Circuit in *E & E Hauling, Inc. v. Forest Preserve Dist.*, etc., 613 F.2d 675 (7th Cir. 1980), looked to the above cited Supreme court cases in setting forth the proper analysis a trial court should use to determine whether a state's impairment of its own contractual obligations is permissible. In *E & E Hauling*, the plaintiff alleged that a contract entered into by it and a county forest preserve district was impaired as a result of the promulgation and enforcement of certain ordinances subsequently passed by the district. After holding that the complaint stated a cause of action, the Court of Appeals set forth the following guidelines for the trial court to consider on remand with respect to whether the asserted impairment violated the contract clause:

> "Not all impairments of contractual obligations are unconstitutional. (Citation omitted.) Instead a court 'must attempt to reconcile the strictures of the Contract Clause with the "essential attributes of sovereign power" . . . necessarily reserved by the States to safeguard the welfare of their citizens.' *United States Trust*, 431 U.S. at 21, 97 S.Ct. at 1517, Citing *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 435,

> 54 S.Ct. 231, 78 L.Ed. 413 (1934). A state does reserve broad power to adopt regulations to protect the public without being concerned with upsetting contractual obligations. This power, however, is not unlimited. A substantial impairment will be found unconstitutional when it is shown that the legislation was not reasonable and necessary to meet an important social problem. *Allied Structural Steel*, 438 U.S. at 242-44, 98 S.Ct. 2716. (Citations omitted). In addition, the severity of the impairment 'measures the height of the hurdle the state legislation must clear.' *Allied Structural Steel*, 438 U.S. at 245, 98 S.Ct. at 2723. Thus, on remand we direct the district court, in considering whether the contract clause has been violated, to balance the District's interest in its ordinance with the degree of impairment of the plaintiff's contractual expectations." *Id.* at 681. (Footnote omitted.)

The analysis engaged in by this Court in *Allied Structural Steel* and *United States Trust Co.* shows that a state's claim that is abrogation of a contract was a proper and justifiable exercise of legitimate police power is an affirmative defense to be proven by the state at trial. This Court has laid down standards in these cases which the state must meet in order to establish that its exercise of the police power, did not violate the Contract Clause. In both *Allied Structural Steel* and *United States Trust Co.*, the states failed to meet that burden *at trial*. The Seventh circuit in *E & E Hauling* recognized the limitations placed on a state's exercise of its police powers by the Contract Clause and remanded the case to the district court for a factual determination as to whether the exercise of the police power was reasonable and necessary to meet an important social problem.

In the case at bar, the Court of Appeal found that as a matter of law the State is not liable for the effect of any legislation "enacted under the police power for what the

legislature believes is a public purpose.'' (A at 5) At the pleading stages, without a trial to determine the reasonableness of the Appellees' asserted exercise of its police powers, the Court of Appeal found that the repeal of the NOx legislation did not violate the Contract Clause of the Constitution. This conflicts with express rulings of this Court.

B. The Contracts Between Appellees and Appellants Were Not Invalid Ab Initio.

Appellees argued below that any agreements or contracts that were formed between the State and these Appellants to require the installation of NOx devices on vehicles in California would be invalid, *ab initio*, as an attempt to restrict future exercise the police power of the State of California. In so arguing, the Appellees cited *United States Trust Co.* for the proposition that, ''the police power and the power of eminent domain were among those that could not be 'contracted away'. . . .'' *Id.* at 431 U.S. at 23-24.

However, *United States Trust Co.* does not support that view. The legislation which was attacked in that case, the repeal of a prior law restricting the use of funds by the Port Authority, was an exercise of the police power of the States of New York and New Jersey. This Court determined that the contract which the states had entered into, by the passage of the original legislation, did restrict and constrain those states' police power to pass the repeal legislation.

In *United States Trust Co.*, this court did cite earlier decisions dealing with the reserved-powers doctrine, which required ''a determination of the States' power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.'' *Id.* at 431 U.S. at 23 This Court then said,

> "In deciding whether a state's contract was invalid, *ab initio*, under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the state. Thus, the police power and the power of eminent domain were among those that could not be 'contracted away', but the State could bind itself in the future exercise of the taxing and spending powers." *Id.* at 23-24.

However, this Court expressly avoided affirming the validity of those distinctions. It stated,

> "Such formalistic distinctions perhaps cannot be dispositive . . . ." *Id.* at 431 U.S. at 24.

The argument of Appellees below was that this formalistic distinction is dispositive of these Appellants' rights without regard to the facts or circumstances of the contractual relationship.

The contract in this case is very much like the contract in the *United States Trust Co.* case.

In *United States Trust Co.*, the states sought the public marketability of Port Authority bonds, while the Appellees sought a solution to the air pollution crisis. In *United States Trust Co.*, the states took action to insure an adequate transportation system between New Jersey and New York, while the Appellees took action to insure healthful air quality. The states in *United States Trust Co.* enacted legislation forcing the Port Authority to retain security for the outstanding bonds while the Appellees enacted legislation forcing citizens to buy the pollution control devices. The enactment of the legislation in *United States Trust Co.* was intended to encourage investment in Port Authority Bonds (431 U.S. at 17-18) while the enactment of the NOx legislation was intended to encourage investment in the design and manufacture of NOx devices. The states realized their objective by controlling the conduct of the Port Authority for the

benefit of the bondholders while the Appellees realized their objective by prescribing the conduct of the citizens of the State for the benefit of Petitioners, as well as for the citizens themselves.

Instead of enacting the 1962 covenant, New Jersey and New York could have guaranteed payment of interest and principal on the bonds. Such a guarantee would clearly have been an enforceable financial contract. Similarly, the Appellees could have contracted with Petitioners to purchase the NOx devices, with the Appellants intending to distribute and install the devices through their own authorized dealers. Such a financial agreement would have been as enforceable as the guarantee agreement postulated above. The point is there are many ways to accomplish the same objective. If, as here and in *United States Trust Co.*, the subject matter of the contract centers around a financial obligation, the method which the State has chosen to accomplish its objective should not affect the enforceability of the obligation which is the basis for the agreement.

These Appellants invested millions of dollars in a smog prevention program, at the express request of the State of California. They were induced to do so by a promise from the State that the Appellants would receive an economic return. Appellants ask this Court to determine that the "formalistic distinction" recognized but not affirmed in *United States Trust Co.* may not be applied to deny them *any remedy* for the losses which they have suffered.

For example, in this case, the application of the Contract Clause to this case does not necessarily mean that the alleged exercise of the police power by the State in passing the repeal legislation need be invalidated. Appellants have sought compensation for only the amounts they expended in performing their commitments under the contract. Appellants have not demanded that the State adhere to a con-

tract that surrenders an essential attribute of its sovereignty. The granting of a less severe remedy may resolve the apparent friction between the Contract Clause and the reserved-powers doctrine.

C. The Court of Appeal's Holding That Appellees Cannot Be Held Liable for a Taking of Property in This Case Raises a Novel Question of Law Specifically Left Unanswered by This Court Last Term.

The Court of Appeal found that Appellees could not be held liable "for the effect of legislation enacted under the police power." (A-5). As applied to the takings claim asserted by the Appellants, this "basic rule" apparently reflects the application by the court of the doctrine that damages are not available in California for takings that result from inverse condemnations. In *Agins v. City of Tiburon*, ... U.S. .... , 100 S.Ct 2138 (1980), this Court specifically left unanswered the question whether the State of California could limit the remedies available for an inverse condemnation that constitutes a taking to mandamus and declaratory judgment: "The State Supreme Court determined that the Appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Id.* at 2142-43. The immediate case provides a particularly good forum for this Court to decide this issue.

Appellants seek compensation from Appellees for the alleged taking of their property pursuant to an inverse condemnation. As a result of Appellees' alleged exercise of their police powers in amending the NOx legislation, Ap-

pellants have been denied any substantial or reasonable use for the NOx devices and technology and have lost the contractual rights whereby Appellees would require all owners of the Subject Vehicles to install NOx devices. Appellants seek damages for this taking by Appellees because no other remedy can provide just compensation to the Appellants. Repeal of the amendments to the NOx legislation will not serve to restore to the Appellants the value of the property taken. The contract between the Appellants and Appellees required the rapid installation of smog devices on cars built in the years 1966 to 1970. In 1974, there were hundreds of thousands of these cars on the road; in 1980, there are certainly fewer. By the time this case is resolved, there may well be no such cars remaining. Because of the temporal nature of the value of Appellants' property, Appellants cannot be justly compensated by any remedy except damages. To allow the State of California to limit relief available for an inverse condemnation that constitutes a taking in this case would leave Appellants without any effective remedy for such a taking.

D. The California Tort Claims Act of 1963 Cannot Deny Appellants a Remedy for Constitutional Violations. To Allow the Clearly Erroneous Court of Appeal Ruling to Stand Would Impair the Constitutional Rights of All Who Deal With the State of California.

The Court of Appeal held that despite the claims asserted by the Appellants "the case at bench falls squarely within an express governmental immunity" found in the California

Torts Claims Act of 1963.[5] By resting its decision on the California immunity statutes, the Court of Appeal denied the Appellants any remedy for the alleged violation of their rights under the United States Constitution. The Court of Appeal's holding must be interpreted to state that even if Appellees took Appellants' property without just compensation and even if the Appellees impaired their contracts with Appellants in violation of the Contract Clause, the California Tort Claims Act immunizes the Appellees from the dictates of the United States Constitution and denies the Appellants any remedy for the alleged violations of their constitutional rights.

1. The California Tort Claims Act Cannot Immunize the Appellees From the Requirements of the Fifth Amendment to the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution prohibit a state from taking property for public use without just compensation. *See, e.g., Chicago, B. & Q. R. Co. v. Illinois ex rel Grimwood*, 200 U.S. 561, 50 L.Ed. 596 (1906); *Appleby v. Buffalo*, 221 U.S. 524, 55 L.Ed. 838 (1911). Appellants claim that Appellees took their property without just compensation in violation of the Fifth Amendment. The Court of Appeal held, however, that the Appellees were immune from liability for the alleged taking under the California Tort Claims Act and affirmed the dismissal of Appellants' complaints. In so doing the Court held a state statute supreme to the Fifth Amendment. This clearly contravenes the dictates of the Supremacy Clause which provides that, "This Constitution, . . . shall

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[5]The Court of Appeal stated:

> "No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Sections 818.2 and 821 of the Government Code read as Government Code read as follows:
>
> A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.
>
> A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Those sections control the case at bench." (A-6).

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2.

A claim of immunity similar to that raised by the Appellees was faced and disposed of by the court in *Sanfilippo v. County of Santa Cruz*, 415 F.Supp. 1340 (N.D. Cal. 1976). The court stated:

> "Defendants assert that under California law public entities are immune from suits for monetary damages growing out of public enactments or permit approval procedures. While this may be true in many areas of tort law, such an immunity doctrine does not apply here. It is an elementary proposition that governmental entities are not immune from actions brought under constitutional provisions guaranteeing just compensation for public takings of private property. To hold, as defendants assert, that all land use regulations are by definition valid discretionary legislative acts would be to ignore the constitutional requirement that takings be accompanied by just compensation and to eliminate actions for inverse condemnation. Irrespective whether protection against inverse condemnation is afforded under the California Constitution, California immunity legislation could not limit the substantive rights of landowners under the 5th and 14th Amendments of the United States Constitution." *Id.* at 1343. (Footnote omitted.)

Appellants implore this Court to reverse the Court of Appeal's holding that provides Appellees immunity from the Appellants' Fifth Amendment claim. The implications of such a clearly erroneous holding are staggering.

2. The California Tort Claims Act Cannot Immunize Appellees From Claims Alleging the Impairment of a Contract to Violation of the Contract Clause.

The Court of Appeal also affirmed the dismissal with prejudice of the Appellant's contracts claim on the grounds that the State enjoyed an absolute immunity under the California Torts Claims Act. In so doing, the court implicity found that even if the alleged contracts existed and even if the Appellees impaired the contracts in violation of the Contract Clause of the United States Constitution, the Appellants nevertheless were not entitled to a remedy for the violation of their constitutional rights. Just as with the Appellant's Fifth Amendment claim, to hold that the State statute immunizes the Appellees from suit for the violation of Appellants' rights under the Contract Clause denies Appellants their constitutional rights and conflicts with the Supremacy Clause. As stated by the Fifth Circuit in *N.A.C.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966), *cert. denied* 385 U.S. 820, "any State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof." *Id.* at 833. The Court in this case interpreted a State law so as to thwart the Appellants' attempt to vindicate their rights under the Contract Clause of the United States Constitution. If this Court fails to reverse this decision, the State of California as well as the other states will be free to violate constitutional rights with immunity by enacting statutes such as the California Tort Claims Act.

CONCLUSION.

For the foregoing reasons, Combustion Sciences Inc. prays this Court to note probable jurisdiction of the Appeals.

Respectfully submitted,

GRAYSON, GROSS, FRIEDMAN,
PHILLIPS,
RASCH & BLOCK,
SAUL GRAYSON,
RICHARD D. FARKAS,
Attorneys for Appellee, Combustion Sciences, Inc.

No. 80-177

IN THE

Supreme Court of the United States

October Term, 1980

DANA CORPORATION and THE ECHLIN MANUFACTURING CO.,

Appellants,

vs.

STATE OF CALIFORNIA and LEGISLATURE OF THE STATE OF CALIFORNIA, COMBUSTION SCIENCES, INC., *et al.*,

Appellees.

APPENDIX.

APPEAL FROM JUDGMENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Minute Order of The Superior Court of California, County of Los Angeles.

Superior Court of California, County of Los Angeles, Dept. 82.

Date: December 6, 1977.

Honorable: Jack T. Ryburn, Judge.

M. Simpson, Deputy Clerk.

Dana Corporation, etc., vs. State of California, et al. C 158 741.

NATURE OF PROCEEDINGS.

C 175 498

C 176 787

C 177 272

In the matter heretofore submitted for decision on December 2, 1977, the Court now rules as follows:

Demurrer of defendants State of California, Edmund G. Brown, Jr., as Governor of California, and the California Legislature is sustained on grounds as set forth below. No leave to amend.

The State has correctly set forth the legal doctrines upon which its demurrers are based. The legislature acted within its power, it cannot be estopped, the Air Resources Board was not authorized to bind the State to a contract, and any promise not to modify prior legislation is void.

The facts alleged by plaintiffs upon which the ruling on demurrer must be based, go beyond a business committing itself in reliance on the passage of legislation. Plaintiffs allege legislation passed to abate a crisis and amendments to that legislation to induce development and production of NOx devices. They also allege cooperation between plaintiffs and Air Resources Board and accreditation of certain NOx devices manufactured by the plaintiffs. Plaintiffs' reliance cannot be disputed, but despite a sympathetic approach, this Court has re-

luctantly concluded that plaintiffs have not and cannot state a cause of action for their loss.

The argument that the loss should be spread among all of the taxpayers of the state is one that can be made to the Legislature, but is not a basis for overruling defendants' demurrers, nor is the fact that the Legislature may find the business community much less willing to cooperate under similar circumstances in the future.

Counsel Joel Moskowitz is to give notice, and is to prepare an order of dismissal pursuant to section 581(3) of the Code of Civil Procedure. A copy of this minute order is mailed to appearing counsel.

Opinion of the Court of Appeal of the State of California.

In the Court of Appeal of the State of California. Second Appellate District, Division Four.

Dana Corporation, *et al., Plaintiffs and Appellants, v. State of California, et al., Defendants and Respondents.*

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2 Civ. No. 55838, (Super. Ct. No. C-158, 741 Consolidated with Nos. C-176,787, C-175, 498. C-177,272).

Filed: March 13, 1980.

APPEALS from judgment (orders of dismissal) of the Superior Court, Los Angeles County, Jack T. Ryburn, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, Dennis H. Vaughn, Donald A. Daucher and Steven C. Kenninger for Plaintiff and Appellant Dana Corporation.

Munger, Tolles & Rickerschauser and Dennis C. Brown for Plaintiff and Appellant Echlin Manufacturing Company.

Egerman, Brown & Rosen and Philip M. Brown for Plaintiff and Appellant Contignitron Company.

No appearance for Plaintiff and Appellant Combustion Schiences. [SIC]

George Deukemjian, Attorney General, R.H. Connett, Assistant Attorney General, and Joel S. Moskowitz, Deputy Attorneys General, for Defendants and Respondents.

Plaintiffs appeal from judgments (orders of dismissal) entered after demurrers to their complaints were sustained without leave to amend. We affirm.

In these consolidated actions, the plaintiffs seek damages from the State of California and the Legislature, for repeal of certain legislation. In essence, tne complaints (third amended complaint) allege the following:

In November 1971 the Legislature, as part of legislation intended to alleviate the problem of air pollution caused by automobiles, enacted an amendment to the Air Resources Act (c.1507, Laws of 1971), empowering the Air Resources Board to adopt standards regulating the emission of oxides of nitrogen (NOx) and requiring the installation of devices designed to accomplish that end. There followed a long period during which the board aggressively sought manufacturers (including these plaintiffs) to conduct the necessary studies to permit the manufacture of controls, saleable at a reasonable price. During that period, the board also adopted and amended regulations setting standards for the desired devices and, from time to time, extending the date when compulsory installation of such devices would be required. Plaintiffs, in reliance on the statute, the regulations and the importunities of the board, expended substantial sums in designing the type of devices involved and, ultimately, secured approval of most of the devices so designed. In 1974, the Legislature repealed the NOx legislation, except as to a minor number of motor vehicles. As a result, the market for the devices designed by plaintiffs and ap-

proved by the Board ceased to exist, causing plaintiffs to lose the monies expended by them on the NOx program.

Demurrers to the complaints were sustained without leave to amend and this appeal followed. We affirm the dismissals.

Plaintiffs attempt to claim a right of recovery on various theories. All of the claims run afoul of the basic rule that the state is not liable for the effect of legislation enacted under the police power for what the Legislature believes is a public purpose. Plaintiffs here contend that the doctrine is subject to exceptions, citing to us two cases: *United States Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1 and *Furey v. City of Sacramento* (1979) 24 Cal.3d 862. Neither case is in point here.

In *United States Trust*, bonds had been sold by an agency of the state, under a statute which strictly limited the purposes for which the capital and earnings could be used, thus insuring to the bond holders a reasonable expectancy of repayment. When the state attempted to broaden the permissible uses, the Supreme Court held that the statute under which the bonds were issued was part of the bond contract and could not be changed to the detriment of the bond holders. No such contract appears here.

In *Furey* the city had collected money from a landowner for the express purpose of constructing a sewage system useful only if the area was to be zoned industrial. When the city zoned the area for other uses, for which the sewer system was not needed, the Supreme Court held that it was obligated to refund the money paid for the, now useless, sewer system. Again, the case is not in point; it is not alleged, and could not be alleged, that the state has ever received any money from the plaintiffs, or that it has, in effect, divered [SIC] plaintiffs' money to an improper use.

All that plaintiffs have alleged, or could allege, is that the Legislature, in 1971, thought that requiring NOx devices on old cars was desirable and that, by 1974, the then Legislature thought that such a requirement was not desirable. A Legislature is not liable, nor is the state liable, for a change in its perception of public interest. Many things once thought desirable or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability.

No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Section 818.2 and 821 of the Government Code read as follows:

"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

"A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Those sections control the case at bench.

The judgments (orders of dismissal) are affirmed.

CERTIFIED FOR PUBLICATION.

Kingsley, *Acting P.J.*

We concur:

Jefferson (Bernard), J.*

Burke (Michael L.), J.*

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*Assigned by the Chief Justice of California.

*Assigned by the Chief Justice of California.

Denial of Appellant's Petition for Hearing by California Supreme Court Dated May 8, 1980.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

I have this day filed Order May 8, 1980 Hearing Denied.

In re: 2 Civ. No 55838 Dana Corporation, etc., et al. vs. State of California etc.

Respectfully,
Clerk

The NOx Legislation.

Air Pollution—Exhaust Emission Devices
Chapter 1507
Senate Bill No. 578

An act to add Sections 39107.6, 39177.1, 39177.2, 39177.3, and 39177.4 to the Health and Safety Code, and to amend Section 4602 of the Vehicle Code, relating to air pollution, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SEC. 1. Section 39107.6 is added to the Health and Safety Code, to read: 39107.6.

Notwithstanding Section 39107, the board shall set standards for devices to significantly reduce the emission of oxides of nitrogen from the exhaust of 1966 through 1970 model year motor vehicles, as determined by the board from a representative sampling of such vehicles, which the board has found to be necessary and technologically feasible to carry out the purpose of this part.

In setting standards under this section, the primary consideration shall be the greatest possible reduction of oxides of nitrogen.

SEC. 2. Section 39177.1 is added to the Health and Safety Code, to read:

39177.1.

(a) Whenever an exhaust emission control device meeting the standards established by the board under Section 39107.6 is accredited pursuant to the provisions of this article and is available for installation as determined by the board, every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under 6,001 pounds, which is subject to registration in this state,

shall be equipped with such accredited exhaust emission control device in accordance with a schedule of installation to be determined by regulation adopted by the board, in consulation [sic] with the Department of the California Highway Patrol and the Department of Motor Vehicles.

(b) Enforcement of the provisions of subdivision (a) shall be as follows:

(1) Vehicle inspection shall be conducted pursuant to Section 2814 of the Vehicle Code.

(2) Certificates of compliance shall be required upon initial registration, and upon transfer of ownership and registration pursuant to Section 4000.1 of the Vehicle Code.

(3) Certificates of compliance shall be required upon renewal of registration for the year 1973, pursuant to Section 4602 of the Vehicle Code.

(4) By such other authorized means as the board, the Department of Motor Vehicles, and the Department of the California Highway Patrol find practicable.

(c) After one or more devices are initially accredited, no device shall be accredited which is less effective than the one or ones initially accredited. Any subsequent accreditation of a more effective device shall not affect the accreditation of a previously accredited device.

SEC. 3. Section 39177.2 is added to the Health and Safety Code, to read:

39177.2.

The provisions of Section 39177.1 shall not apply to any motor vehicle which, on the effective date of this section, is equipped with a device or devices which meet the requirements of subdivision (c) of Section 39101.5, as determined by the board, or which is exempted by the board pursuant to Section 39177.

SEC. 4. Section 39177.3 is added to the Health and Safety Code, to read:

39177.3.

In accrediting devices, pursuant to Section 39177.1, the board shall, in establishing tests and procedures, adopt standards, including, but not limited to, the following:

(a) An accredited exhaust emission control device shall not cost more than thirty-five dollars ($35), including the cost of installation.

(b) An accredited exhaust emission control device shall not require maintenance more than once each 12,000 miles, and such maintenance shall not cost more than fifteen dollars ($15), including the cost of parts and labor.

(c) An accredited exhaust control device shall equal or exceed the performance criteria established by the board for devices for new motor vehicles or, in the alternative, have an expected useful life of at least 50,000 miles of operation.

(d) The manufacturer of an exhaust emission control device accredited pursuant to this article shall include with the sale of such device instructions setting forth what steps the purchaser should take to maintain such device in proper working condition.

SEC. 5. Section 39177.4 is added to the Health and Safety Code, to read: 39177.4.

(a) Any manufacturer of a device required by Section 39177.1 shall, as a condition of accreditation of such device by the board, agree that until there are two or more accredited devices suitable for installation on motor vehicles of the same classification, such classification to be determined by the board, the manufacturer shall, with respect to his device for such classification of motor vehicles, either: (agree to enter into such cross-licensing or other agreements as the board determines are necessary to insure adequate

competition among manufacturers of such devices to protect the public interest; or (2) agree as a condition to such accreditation that, if only one such device from one manufacturer is made available for sale to the public, the board shall, taking into consideration the cost of manufacturing the device and the manufacturer's suggested retail price, and in order to protect the public interest, determine the fair and reasonable retail price of such device and may require, as a condition to continued accreditation of such device, that the retail price of such device including installation, not exceed such price as determined by the board. In either event, the retail price so determined by the board for a device required by Section 39177.1 shall not be in excess of thirty-five dollars ($35) per vehicle, installed.

(b) Accreditation may be revoked by the board after a public hearing for which notice has been given to the applicant who obtained the accreditation, if the actual cost of the device installed exceeds the cost, installed, estimated, or agreed to by such applicant.

SEC. 6. Section 4602 of the Vehicle Code is amended to read: 4602.

(*a*) Application for renewal of a vehicle registration expiring on the 31st day of December shall be made by the owner not later than midnight of the first Friday in February succeeding the expiration date and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full annual fee for the vehicle as provided in this code.

(*b*) *The department shall require, upon 1973 renewal of registration of any motor vehicle subject to Section 39177.1 of the Health and Safety Code, a valid certificate of compliance from a licensed motor vehicle pollution con-*

trol device installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device which is in proper operating condition and which is of a type that has been accredited by the State Air Resources Board pursuant to Section 39177.1 of the Health and Safety Code. For extraordinary and compelling reasons only, the State Air Resources Board may, by regulation, after a public hearing, defer or delete the requirement of certificates of compliance required pursuant to this subdivision. In such event, the board may adjust the schedule of installation adopted pursuant to subdivision (a) of Section 39177.1 of the Health and Safety Code and shall immediately report to the Governor and the Legislature of actions taken and the reasons therefor.

SEC. 7. The State Air Resources Board, the Department of Motor Vehicles, and the Department of the California Highway Patrol shall by all practicable means at their disposal advise the motoring public of the provisions of this act.

SEC. 8. [Urgency statute]

Approved and filed Nov. 12, 1971.

REPEAL LEGISLATION.

Air Resources Act, ch. 670, 1974 Cal. Legis. Serv. 1872.

Motor Vehicles—Air Pollution
Chapter 670
Senate Bill No. 2471

An act to amend Section 39177.1 of the Health and Safety Code, and to amend and repeal Section 4602, as amended by Chapter 1507 of the Statutes of 1971, of, and to amend Section 4602, as amended by Chapter 889 of the Statutes of 1973, of, the Vehicle Code, relating to air pollution.

LEGISLATIVE COUNSEL'S DIGEST

Requires the installation of oxides of nitrogen exhaust emmission control devices on all 1966 through 1970 model year motor vehicles having a manufacturer's gross vehicle weight rating of under 6,001 pounds, registered in any county included, in whole or in part, within the South Coast Air Basin, in accordance with a schedule of installation adopted in July 1974 by the State Air Resources Board, and on all such motor vehicles registered in the other counties upon initial registration and upon transfer of ownership and registration, rather than on all such vehicles subject to registration in the state, in accordance with such a schedule.

Makes related changes.

The People of the State of California do enact as follows:

SECTION 1. Section 39177.1 of the Health and Safety Code is amended to read: 39177.1

(a) Whenever an exhaust emission control device meeting the standards established by the board under Section 39107.6 is accredited pursuant to the provisions of this article and is available for installation as determined by the board, every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under

6,001 pounds * * * shall be equipped with such *an* accredited exhaust emission control device * * * *as follows*:

(1) If registered in any county included, in whole or in part, within the South Coast Air Basin, as defined by the board, in accordance with the schedule of installation adopted by regulation by the board in July 1974.

(2) If registered in any other county, upon initial registration and upon transfer of ownership and registration.

(b) Enforcement of the provisions of subdivision(a) shall be as follows:

(1) Vehicle inspections shall be conducted pursuant to Section 2814 ofthe Vehicle Code.

(2) Certificates of compliance shall be required upon initial registration, and upon transfer of ownership and registration pursuant to Section 4000.1 of the Vehicle Code.

(3) Certificates of compliance shall be required upon renewal of registration for the year * * * 1976, pursuant to Section 4602 of the Vehicle Code, for such motor *vehicles registered in any county included, in whole or part, within the South Coast Air Basin, as defined by the board.*

(4) By such other authorized means as the board, the Department of Motor Vehicles, and the Department of the California Highway Patrol find practicable.

(c) After one or more devices are initially accredited, no device shall be accredited which is less effective than the one or ones initially accredited. Any subsequent accreditation of a more effective device shall not affect the accreditation of a previously accredited device.

SEC. 2. Section 4602, as amended by Chapter 1507 of the Statutes of 1971, of the Vehicle Code is amended to read:

4602.

* * * Application for renewal of a vehicle registration expiration on the 31st day of December shall be made by the owner not later than midnight of the first Friday in February succeeding the expiration date and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full annual fee for the vehicle as provided in this code.

* * * *This section shall remain in effect only until March 10, 1975, and as of that date is repealed.*

SEC. 3. Section 4602, as amended by Chapter 889 of the Statutes of 1973, of the Vehicle Code is amended to read:

4602.

* * * Application for renewal of a vehicle registration shall be made by the owner not later than midnight of the expiration date, and shall be made by presentation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full registration year fee for the vehicle as provided in this code.

* * * *This section shall become operative on March 10, 1975.*

Approved and filed Sept. 5, 1974.

REPEAL LEGISLATION.

Air Resources Act, ch. 957, 1975 Cal. Legis. Serv. 2474.

Air Pollution—Recodification
Chapter 957
Assembly Bill No. 1758

An act to amend Sections 9889.15, 9889.17, 9889.18, and 9889.51 of the Business and Professions Code; to amend Sections 4477, 6253, 11017, and 14808.5 of the Government Code; to repeal Chapter 2 (commencing with Section 24198) and Chapter 2.5 (commencing with Section 24345) of Division 20, to repeal Division 26 (commencing with Section 39000), Division 27 (commencing with Section 39600), Division 28 (commencing with Section 39800), and Division 30 (commencing with Section 40000) of, and to add Division 26 (commencing with Section 39000, Division 27 (commencing with Section 44500) and Division 28 (commencing with Section 46000) to, the Health and Safety Code; to amend Section 201.5 and 10753 of the Revenue and Taxation Code; to amend Sections 2814, 4000, 4000.1, 4000.2, 4750, 9250.5, 11519, 24007, 24007.5, 27156, and 27156.1 of, and to amend and repeal Section 4602, as amended by Section 2 of Chapter 670 of the Statutes of 1974, of, and to amend Section 4602, as amended by Section 3 of Chapter 670 of the Statutes of 1974, of, the Vehicle Code; and to repeal Section 3 of Chapter 1599 of the Statutes of 1970, relating to air pollution.

LEGISLATIVE COUNSEL'S DIGEST

Existing law contains provisions regarding air pollution and the authority, duties, and responsibilities of the State Air Resources Board and local air pollution control districts.

This bill would repeal and reenact, with various substantive changes, provisions regarding air pollution contained in the Health and Safety Code, and make conforming

changes in the Health and Safety Code and in cross-references in provisions in various other codes.

This bill provides that no appropriation is made nor any obligation created for the reimbursement of any local agency for any costs by it pursuant to the bill.

The people of the State of California do enact as follows:

Article 2. Certified Device Installation

43654.

Every 1966 through 1970 light duty motor vehicle, subject to registration in this state, shall be equipped with a certified device to control its exhaust emission of oxides of nitrogen upon initial registration and upon transfer of ownership and registration.

SEC. 22. Section 4000.1 of the Vehicle Code is amended to read:

4000.1 (a) The department shall require, pursuant to law or regulation of the State Air Resources Board adopted pursuant to Section * * * *43655* of the Health and Safety Code, upon initial registration, and upon transfer of ownership and registration, of any motor vehicle subject to * * * *Part 5* (commencing with Section * * * *43000*) of * * * Division 26 of the Health and Safety Code, a valid certificate of compliance from a licensed motor vehicle pollution control device installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device or devices which are in proper operating condition and which are in compliance with the provisions of * * * *Part 5* (commencing with Section * * * *43000*) of * * * Division 26 of the Health and Safety Code.

With respect to new vehicles having a gross vehicle weight to 6,001 pounds or less, the department shall accept a statement completed pursuant to subdivision (b) of Section 24007 in lieu of the certificate of compliance.

The provisions of this section shall not apply to a transfer of ownership and registration when the transferor is either the parent, grandparent, child, or spouse of the transferee, when a vehicle registered to a sole proprietorship is transferred to such proprietor as owner, or when the transfer is between companies whose principal business is leasing vehicles, if there is no change in the lessee or operator of the vehicle.

(b) The State Air Resources Board * * * , under * * * *Part 5* (commencing with section * * * *43000*) of * * * 26 Division of the Health and Safety Code, may exempt designated classifications of motor vehicles from the provisions of subdivision (a) as they deem necessary, and shall notify the department of such action * * *.

SEC. 23. Section 4000.2 of the Vehicle Code is amended to read:

4000.2.

The department shall require upon registration of a motor vehicle subject to * * * *Part 5* (commencing with Section * * * *43000*) of * * * Division 26 of the Health and Safety Code, previously registered outside this state, a valid certificate of compliance from a licensed motor vehicle pollution control device installation and inspection station indicating that such vehicle is properly equipped with a motor vehicle pollution control device or devices which are in proper operating condition and which are in compliance with the provisons of * * * *that part*.

SEC. 24. Section 4602 of the Vehicle Code, as amended by Section 2 of Chapter 670 of the Statutes of 1974, is amended to read:

4602.

Application for renewal of a vehicle registration *expiring on the 31st day of December* shall be made by the owner not later than midnight of the *first Friday in February succeeding* the expiration date and shall be made by presen-

tation of the registration card last issued for the vehicle or by presentation of a potential registration card issued by the department for use at the time of renewal and by payment of the full *annual* fee for the vehicle as provided in this code.

This section shall *remain in effect only until March 8, 1976, and as of that date is repealed.*

The California Tort Claims Act, Cal. Claims and Actions Code §§814, 818.2, 821.

§ 814. Effect upon liability based on contract or right to relief other than money or damages. Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee (Added Stats. 1963, c. 1681, p. 3267, § 1.)

§ 818.2 Adoption or failure to adopt or enforce enactment. A public entity is not liable for an injury caused by adopting or failing to adopt an enactment of by failing to enforce any law. (Added Stats. 1963, c. 1681, p. 3268, § 1.)

§ 821. Adoption or failure to adopt or enforce enactment. A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment. (Added Stats. 1963, c. 1681, p. 3269, § 1.)

Complaint for Damages.

Superior Court of the State of California for the County of Los Angeles.

Combustion Sciences, Inc., a California corporation, Energy Sciences, Inc., a California corporation, Plaintiffs, vs. State of California, the California Legislature, and Does 1 through 25, Inclusive, Defendants. NO. C177272. Filed: Oct. 15, 1976.

Plaintiffs allege:

FIRST CAUSE OF ACTION

1. At all times herein mentioned, plaintiff, COMBUSTION SCIENCES, INC. (hereinafter referred to as "CSI") was and is a corporation organized and existing under the laws of the State of California.

2. At all times herein mentioned, plaintiff, ENERGY SCIENCES, INC. (hereinafter referred to as "ESI") was and is a corporation organized and existing under the laws of the State of California, and was and is the owner of 82% of the stock of CSI.

3. At all times mentioned herein, defendant State of California was and is a sovereign state of the United States of America.

4. At all times mentioned herein, defendant Legislature of the State of California was and now is a governmental unit created by the California Constitution.

5. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as Does 1 through 25 are unknown to plaintiffs, who therefore sue said defendant by such fictitious names and plaintiffs will amend this Complaint to show their names and capacities when the same have been ascertained. Hereinafter defendants State of California, Legislature of

the State of California and Does 1 through 25, will be collectively referred to as ''defendants''.

6. At all times mentioned herein, each defendant was and now is an agent of each other and of every other defendant herein, and as such agent was acting within the course and scope of its employment at the time and times herein alleged.

7. Defendants caused to be enacted in 1967 the Air Resource Act, California Health and Safety Code §§39000 *et seq*. This Act established the Air Resources Board (hereinafter referred to as the ''ARB'').

8. In November, 1971, defendants caused to be enacted certain amendments to the Air Resources Act which required the ARB to set standards for devices to significantly reduce the emission of oxides of nitrogen (hereinafter referred to as ''NOx'') from the exhaust of certain 1966 through 1970 model year motor vehicles (hereinafter referred to as ''subject vehicles''). The ARB was vested with the authority to grant accreditation to manufacturers of specific devices according to standards to be established by the ARB. (This amendment, C. 1507 (1971, is hereinafter referred to as the ''NOx Legislation.'')

9. The NOx Legislation was adopted as an urgency measure and became effective on November 12, 1971. The urgency section of the NOx Legislation provides:

> ''SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:
> Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California's citizens. It

is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this Act will also give manufacturers additional time to develop such devices.''

10. In pertinent part, the NOx Legislation provided that every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under 6,001 pounds, which is subject to registration in California, shall be equipped with an accredited exhaust emission control device.

11. Beginning in 1971, defendants, through their authorized agents, employees, servants and representatives, entered into a course of conduct designed to induce and encourage plaintiffs to design and obtain accreditation for, and to induce, encourage and require plaintiffs to manufacture and maintain an inventory of NOx emission control devices (hereinafter referred to as ''NOx devices''). It was the plan and requirement of defendants that plaintiffs develop said NOx devices and manufacture and maintain said inventory before the NOx devices were first required to be installed on the subject vehicles.

12. CSI, in reliance on the actions and aforesaid course of conduct of defendants, and with the aid of ESI, was induced to and did engage in extensive research, development and engineering toward production of NOx devices, expending in the process, considerable time, money and effort. CSI licensed the basic exhaust emission control device it developed to Echlin Manufacturing Company of Branford, Connecticut (hereinafter referred to as ''Echlin'').

13. Following further research, development, engineering and testing, the NOx device designed and manufactured by Echlin under its licensing agreement with CSI, was accredited by the ARB prior to the date upon which installation of the approved devices became mandatory.

14. In November 1972, September 1973 and again in July 1974, the ARB adopted resolutions which contained schedules for installation of the NOx devices.

15. On September 5, 1974, and again on April 23, 1975, defendants caused to be enacted certain amendments to California Health and Safety Code Section 39177.1, which amended the Air Resources Act, and, in effect, repealed the NOx Legislation. These amendments reduced to an insignificant number the motor vehicles on which the NOx device was required to be installed, and, together with other sections of the California Health and Safety Code, combined to prohibit the installation of the NOx device on the vast majority of 1966 through 1970 model year motor vehicles.

16. As a result of the foregoing actions by defendants, the uses for which the Echlin devices can be utilized have been restricted to such an extent that Echlin has been denied any substantial or reasonable sales of such devices. As a further proximate and consequential result of the foregoing actions by defendants, CSI has been denied any substantial or reasonable royalties payable to CSI from Echlin under the aforesaid licensing agreement, and further ESI has been denied any substantial or reasonable recovery of costs advanced on behalf of CSI. Thus, substantial property rights of plaintiffs' have been taken without compensation and said property rights have been diminished and damaged by an amount not less than $2,000,000.00. When the exact amount of such damage is ascertained, plaintiffs will ask

leave of this Court to amend this Complaint to insert the exact amount thereof.

17. Plaintiffs have not been compensated by the defendants or any of them for the taking and damaging of their property as aforesaid.

18. With respect to the acts of defendants in causing to be enacted on April 23, 1975 certain amendments to California Health and Safety Code Section 39177.1, plaintiffs have complied with the claim requirements of Government Code Section 900 *et seq.* by filing with the State Board of Control claims damages, and said claims were denied on April 20, 1976.

SECOND CAUSE OF ACTION

19. Plaintiffs reallege and incorporate by reference herein all the allegations of Paragraphs 1 through 15 and Paragraphs 17 and 18 above as though fully set forth at length.

20. Defendants expressly requested plaintiffs to participate with Echlin in the design, accreditation, manufacture and maintenance of an inventory of NOx devices before the NOx devices were first required to be installed on the subject vehicles.

21. In conjunction with this request, defendants promised to plaintiffs that they would do nothing to materially change the requirement that each and every of the subject motor vehicles be equipped with an accredited NOx device. Defendants further promised plaintiffs that if they indeed did participate with Echlin in the design, accreditation, manufacture and maintenance of an inventory of NOx devices, they would be compensated therefor through the licensing agreement with Echlin.

22. Plaintiffs, in reliance on the actions and aforesaid course of conduct of defendants, and in expectation of being

compensated for their services, expended considerable time, effort and money in the design, obtaining accreditation for, manufacture and maintenance of an inventory of NOx devices.

23. Defendants materially and substantially breached the promises stated above when they repealed the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was to be installed and prohibit the installation of the NOx device on the vast majority of 1966 through 1970 model year motor vehicles, without compensating plaintiffs for the time, effort and money they had expended in participating with Echlin in the designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

24. As a direct and proximate result of said breach, plaintiffs have been damaged in an amount not less than $2,000,000.00. When the exact amount of such damage is ascertained, plaintiffs will ask leave of this Court to amend this Complaint to insert the exact amount of damages.

THIRD CAUSE OF ACTION

25. Plaintiffs reallege and incorporate by reference herein all the allegations of Paragraphs 1 through 15 and Paragraphs 17 and 18 above as though fully set forth at length.

26. Defendants impliedly requested plaintiff to participate with Echlin in the design, accreditation, manufacture and maintenance of an inventory of NOx devices before the NOx devices were first required to be installed on the subject vehicles.

27. In conjunction with this request, defendants impliedly promised to plaintiffs that they would do nothing to materially change the requirement that each and every of the subject motor vehicles be equipped with an accredited

NOx device. Defendants further impliedly promised plaintiffs that if they indeed, did participate with Echlin in the design, accreditation, manufacture and maintenance of an inventory of NOx devices, they would be compensated therefor through the licensing agreement with Echlin.

28. Plaintiffs, in reliance on the actions and aforesaid course of conduct of defendants, and in expectation of being compensated for their services, expended considerable time, effort and money in the design, obtaining accreditation for, manufacture and maintenance of an inventory of NOx devices.

29. Defendants materially and substantially breached the promises stated above when they repealed the NOx Legislation in such a manner as to reduce to an insignificant number the motor vehicles on which the NOx device was to be installed and prohibit the installation of the Nox device on the vast majority of 1966 through 1970 model year motor vehicles, without compensating plaintiff for the time, effort and money they had expended in participating with Echlin in the designing, obtaining accreditation for, manufacturing and maintaining an inventory of the NOx devices.

30. As a direct and proximate result of said breach, plaintiffs have been damaged in an amount not less than $2,000,000.00. When the exact amount of such damage is ascertained, plaintiffs will ask leave of this Court to amend its Complaint to insert the exact amount of damages.

WHEREOF, plaintiffs pray judgment against defendants and each of them, jointly and severally, as follows:

1. Damages in the sum of $2,000,000.00 or according to proof;

2. For costs of suit; and

3. For such other and further relief as may be just and proper.

GRAYSON & GROSS, INC.
By Saul Grayson,
Attorneys for Plaintiffs.

Notice of Appeal
to the Supreme Court of the United States

In the Court of Appeal Second Appellate District of the State of California.

Dana Corporation and the Echlin Manufacturing Company, Appellants, vs. State of California and Legislature of the State of California, *et al.*, Appellees. 2nd Civil No. 55838.

NOTICE IS HEREBY GIVEN that Combustion Science, Inc., the Appellant named above, hereby appeals to the Supreme Court of the United States from the final judgment the California Court of Appeal, Second Appellate District entered in this action on March 13, 1980 which judgment affirmed the Los Angeles Superior Court's dismissal of the Appellant's complaints without leave to amend and as to which judgment the California Supreme Court denied a hearing on May 8, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated: August 5, 1980

GRAYSON, GROSS, FRIEDMAN,
PHILLIPS, RASCH & BLOCK,
SAUL GRAYSON,
RICHARD FARKAS,
By SAUL GRAYSON,
Attorneys for Combustion Sciences, Inc.